BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH A. PENNINGTON Claimant VS. **KRAFT TOOL COMPANY** Respondent AND **ACCIDENT FUND INS. CO. OF AMERICA** Insurance Carrier	)	Docket No. **1,055,538**

ORDER

Respondent and its insurance carrier request review of the June 15, 2011 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

This claim is for injuries claimant alleges she suffered while lifting a box at work. Respondent denied claimant suffered a work-related injury and further denied that she provided timely notice of her alleged accidental injury.

The Administrative Law Judge (ALJ) found claimant sustained a compensable accidental injury on February 22, 2011. The ALJ further determined there was just cause for claimant's failure to provide notice within 10 days. Consequently, because claimant provided respondent notice of her accidental injury within 75 days, there was timely notice.

Respondent requests review of whether the ALJ erred in finding claimant gave timely notice and whether her accidental injury arose out of and in the course of employment. Respondent argues claimant failed to establish just cause for her failure to provide notice of the accident within 10 days after February 22, 2011. Respondent further argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant started working for Kraft Tool Company on April 28, 2006. On February 22, 2011, claimant was lifting boxes and placing them on a shelf that was about chest high when she felt something pull in her neck. Claimant continued working and finished her shift. She worked a couple more days (Wednesday, Thursday) hoping that her condition would improve.

Claimant had arranged to take leave under FMLA because her mother was having surgery for pancreatic cancer. Her FMLA began February 25, 2011. Claimant spent a week at her mother's bedside at the hospital. The FMLA ended on March 4, 2011, and claimant was scheduled to return to work on Monday, March 7, 2011.

After she returned to work performing her normal job duties, claimant began to have worsening problems with her shoulder and neck while lifting. Claimant tried to avoid lifting and just drove her forklift. But because of worsening pain, claimant sought treatment with her own family doctor.

Claimant explained that she did not intend to file a workers compensation claim because she thought her condition would improve and she was afraid to file a claim. She testified:

> Q. And did you initially intend not to make a workers' compensation claim for this?
>
> A. No, I did not.
>
> Q. What was the reason that you did not intend to make such a claim?
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> A. I had thought that eventually it would work itself out, and when it didn't I was afraid of saying anything because I had heard rumors, and also I was afraid of missing any work because my supervisor would get upset for that time off or if I missed any work, and I didn't want to cause any problems for Kraft Tool.[1]

Dr. Maribeth Orr, claimant's physician, saw the claimant on Tuesday, March 15, 2011. Claimant complained of right shoulder pain. Upon physical examination, claimant had muscle spasms in her cervical spine as well as tenderness in the right shoulder and moderately reduced range of motion. The doctor ordered an x-ray of claimant's right shoulder. Dr. Orr diagnosed claimant as having shoulder pain and impingement with

[1] P.H. Trans. at 17-18.

bursitis-tendinitis and prescribed medication. The doctor also noted that if claimant's neck pain continued or worsened an MRI of the neck would be considered.

After seeing Dr. Orr on March 15, 2011, claimant notified her supervisor that she may need to have physical therapy due to an injury. On March 17, 2011, claimant, her supervisor and Ms. Flaker had a meeting wherein claimant explained to them the specific details of her work-related injury on February 22, 2011. Ms. Flaker advised claimant to seek treatment through OHS Compcare.

On April 5, 2011, claimant returned to see Dr. Orr for a follow-up visit regarding her neck pain. An MRI of the cervical spine was ordered due to no improvement in claimant's neck and shoulder. Claimant was evaluated at OHS Compcare on April 8, 2011. When claimant saw the doctor at OHS for the first time on April 8, 2011, she advised the doctor that she had injured herself at work on February 22, 2011. Restrictions were placed on claimant of no lifting greater than 20 pounds from knee to table. Respondent assigned claimant to a job that involved standing at a table doing packing or stickering which required her to bend down. The bending down aggravated her neck pain. Claimant returned to OHS Compcare on April 12, 2011, due to her increased neck complaints. Claimant's restrictions were changed to no pushing, pulling or lifting greater than 10 pounds and no operation of machinery.

Claimant testified that when she was placed in an accommodated job, the surveillance camera was re-directed at her. The camera's monitor was located in Ms. Flaker's office and was being viewed by her.

Initially, respondent argues that claimant failed to establish just cause for her failure to provide notice of her alleged injury within 10 days after February 22, 2011.

K.S.A. 44-520 requires that notice of accident be given to respondent within 10 days of the date of accident. However, the statute goes on to state:

> The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.[2]

[2] K.S.A. 44-520.

This Board Member must consider whether claimant had just cause under K.S.A. 44-520 for failing to provide notice within the 10 days as is required by statute. When just cause is provided to justify a worker's failure to give notice under K.S.A. 44-520, then the time for providing notice is extended to 75 days from the date of accident.

Factors which should be considered in determining whether just cause exists include:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually;

(2) Whether the employee is aware they have sustained either an accident or an injury on the job;

(3) The nature and history of claimant's symptoms;

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1 (currently K.A.R. 51-12-2).

In this instance, claimant's problem began on February 22, 2011. She testified that she initially thought the condition would improve. And she had a break from work activities while she spent a week at her mother's bedside. But when she returned to work her condition did not improve and instead worsened. And when her condition worsened with her return to work, claimant testified that she was fearful of reporting the accident. Additionally, claimant had preexisting bilateral shoulder problems which she thought could be the source of her pain. It was not until her physician noted that her neck pain was not related to her shoulder condition that claimant realized her condition was due to the lifting incident at work.

Claimant then discussed her problem with her immediate supervisor in March, well within the 75-day time limit. Her supervisor, Ms. Pappas, did acknowledge that the conversations took place and agreed that claimant testified that she was not sure if her problem was from her shoulder or her neck. Under these circumstances, this Board Member finds that there was just cause for claimant's delay in advising respondent of the accidental injury occurring on February 22, 2011. Additionally, this Board Member finds the conversations between claimant and her supervisor were sufficiently specific to put respondent on notice that claimant was having ongoing difficulties and that those difficulties were associated with her employment with respondent. This Board Member, therefore, finds that claimant satisfied the requirements of K.S.A. 44-520 and the Order of the Administrative Law Judge should be affirmed.

Respondent next argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment. Respondent argues that when claimant saw her personal physician she did not mention that she had suffered an accidental injury at work. And the claimant told her physician the onset of pain was 10 days ago which would have been while she was taking FMLA. But claimant denied telling the doctor that the onset of pain had occurred 10 days ago. And although the doctor's record of the visit does contain the notation "Context: there was no injury."[3] That same record also notes "10 days ago pt was lifting a heavy object above her head."[4]

Respondent further argues that claimant described the product that she was lifting on February 22, 2011, and her supervisor noted that product had been received and stocked well before the alleged accident date. But claimant noted, and her supervisor agreed, that product was at times lifted and moved after it had been stocked.

In summary, claimant testified that she did not tell her doctor that the onset of pain was 10 days before the accident date. And she was certain she was lifting product on February 22, 2011, when she suffered the onset of pain. Conversely, her supervisor noted that the alleged product had already been stocked. This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible. Where there is conflicting testimony, as in this case, the credibility of the respective witnesses is even more important to the determination of the issues in dispute. In approving claimant's request for preliminary benefits, the ALJ believed claimant over the testimony of respondent's witness. Consequently, the ALJ found that claimant met her burden proof to establish she suffered an accident and injury at work that arose out of and in the course of her employment with respondent.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*[5], appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[6]

Here, the ALJ had the opportunity to personally observe the claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ was able to observe the testimony in person. Having

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[3] P.H. Trans., Resp. Ex. A.

[4] Id.

[5] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

[6] *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008).

reviewed the entire record presented to date, this Board Member agrees that claimant has met her burden of proof that she suffered a work-related accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated June 15, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[7] K.S.A. 44-534a.

[8] K.S.A. 2010 Supp. 44-555c(k).